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September 28, 2007 70008.00002

VIA ECF

Hon. A. Kathleen Tomlinson
United States Magistrate Judge
United States District Court, Eastern District of New York
100 Federal Plaza, P.O. Box 9014
Central Islip, NY 11722-9014

Re: *FragranceNet.com, Inc. v. FragranceX.com, Inc.*, CV-06-2225

Dear Judge Tomlinson:

We represent plaintiff FragranceNet.com, Inc. in this copyright infringement action and submit this request for an order compelling the defendant to provide interrogatory answers, documents and things. Copies of defendant's responses to date are attached hereto as Exhibit A.

Rule 26(b)(6) of the Federal Rules of Civil Procedure allows a party to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party…." For purposes of discovery, "relevant" is broadly construed, and "information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see, e.g., Covermat Corp. v. St. Paul Fire and Marine Ins. Co.*, No. CV 06-1045 (JFB)(AKT), 2007 WL 2743696, at *1 (E.D.N.Y. Sept. 18, 2007) (granting plaintiff's motion to compel in part and acknowledging that the discovery rules are liberal and tend toward admitting as much evidence as possible). The following are the discovery requests in issue (which appear in their entirety in the attached Exhibits).

Category No. 1: Defendant's Web site (Document Request Nos. 1, 2 and 7 and Interrogatory Nos. 1 and 2)

Defendant objects to the above discovery requests on the grounds that they are overbroad and irrelevant to the extent that they seek information regarding all of the content on defendant's Web site, not just information relating only to the photographs alleged to infringe. However, plaintiff's complaint asserts that, in order to compete directly with plaintiff in its on-line fragrance business, defendant

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engaged in wholesale copying of at least 900 of plaintiff's copyrighted photographs. The manner in which defendant conceived of, developed and created its on-line fragrance store, including the computer hardware and software used and the identities of the individuals involved, will help demonstrate defendant's bad faith intent and *modus operandi*. Plaintiff is entitled to discover the steps defendant took in creating and maintaining its Web site and whether defendant considered non-infringing alternatives for competing with plaintiff, including whether there is an *absence* of any such evidence.

Category No. 2: Drop-Ship, Affiliate and Shopping Comparison Web Site Arrangements (Document Request No. 10 and Interrogatory No. 8)

The requested information, documents and things addressing the identities of the entities with which defendant has or has had a drop-ship or affiliate arrangement will enable plaintiff to establish the identities of the John Doe defendants. (Drop shipping occurs where Merchant A advertises its sale of a product to consumers but, upon receipt of an order, has the product shipped to the customer from Merchant B.) The use of plaintiff's copyrighted pictures in such transactions would constitute separate and additional acts of infringement. The requested information and documents also are directly relevant to plaintiff's claim of profits inasmuch as defendant may profit from sales made other than from its own Web site.

Category No. 3: Damages Discovery (Document Request Nos. 11-16)

On August 28, 2007, this Court denied defendant's motion to bifurcate liability and damages discovery. The Copyright Act provides that a successful plaintiff in a copyright infringement action is entitled to recover "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b). Such profits are established by setting forth "proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work." *Id.* Each of the subject discovery requests seeks documents directly relevant to that issue. Defendant has offered to respond to these requests if they were limited to seeking information relating only to profits, revenue and expenses concerning the products that are the subject of the accused photographs. That proposal is inadequate. Defendant's claimed profits, expenses and allocations must be measured and compared to its overall business to ascertain whether the numbers defendant will produce are accurate and justified. Otherwise, plaintiff will have no way of knowing, for example, whether a particular expense or allocation was made, or just made up. To the extent defendant considers such information confidential, the Stipulation and Order of Confidentiality agreed to by the parties addresses those concerns.

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After attempting to resolve this dispute by meeting and conferring on September 6, 2007 and again on September 19, 2007, the parties have reached an impasse. Plaintiff respectfully requests that this Court compel defendant to produce the documents and things called for in plaintiff's Request Nos. 1, 2, 7, 10 and 11-16 and to serve supplemental responses fully responding to Interrogatory Nos. 1, 2, and 8.

Respectfully submitted,

Robert L. Sherman

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of PAUL, HASTINGS, JANOFSKY & WALKER LLP
RLS/lr

cc: David Rabinowitz, Esq. (Via Fax: 212-554-7700)